

REMARKS

I. Rejection under 35 USC §102(b)

Claims 2-6, 10 and 13 have been rejected under 35 USC §102(b) as being anticipated by Smith et al., US Patent No. 5,562,642. The office action states the rejection as follows:

Smith discloses an applicator for topical delivery of drugs. The applicator pads may be formed from several different materials such as foam or sponge...The composition that can be incorporated comprises an aqueous gel, comprising water, an inorganic gelling agent, an inorganic emollient oil, etc...Tables I-III teach different embodiments of the composition and are free of waxes and suspending agents. Column 16, lines 20-51 teach an anhydrous gel preparation.

Applicants respectfully disagree with the current rejection which states that the Smith patent anticipates the claims at issue. First, it is necessary to review the subject matter of the rejected claims. Claim 2, the broadest rejected claim, is directed to a cosmetic or pharmaceutical composition comprising a non-rigid, porous support in which a low-viscosity, gellant-containing, otherwise unstable cosmetic or pharmaceutical formulation is incorporated, which composition comprises an oil phase. Each of the other rejected claims depends from claim 2, and therefore contains by reference each of the contained claim elements. A careful reading of the Smith reference will show that neither the "low viscosity" nor "otherwise unstable" qualifications of present claim 2 are met by the Smith disclosure.

Attention is first drawn to Column 14, lines 6-9, wherein it is expressly noted that the gelling agents are used to "gel or thicken the ...mixture to at least a cream- or lotion-like consistency". Clearly, the authors are not utilizing a low viscosity vehicle as in the present invention, which is, as stated in the specification on page 2, line 16, as "nearly water-thin".. This higher level of viscosity is further corroborated in column 16, lines 18-19, wherein the gels are noted expressly as being "thick/viscous". Thus, notwithstanding the assertion in the office action that the Smith formulations use no waxed or thickeners, it is clear that Smith uses sufficient gelling agent to achieve a relatively high viscosity product.

It also noted that stability of the formulation is an important concern to the authors. Mention is made, in column 15, lines 45-47, of the active component being "stably dispersed...with the aid of an effective amount of one or more inorganic gelling agents" (emphasis added). Column 13, line 46, also refers to the use of surfactants to "stabilize the gelled composition". Thus, it is also clear that Smith et al. had the stated goal of achieving a stable formulation, and not the unstable one of the present invention.

Thus, a thorough review of Smith et al. shows that the reference fails to teach not just one, but two, elements of the present claims. It is axiomatic that in order to anticipate, a reference must disclose each and every element of the claim. *In re Paulsen*, 31 USPQ2d 1671 (Fed.Cir. 1994). Absence of a claim

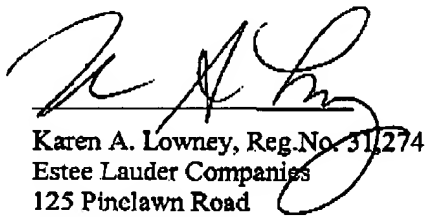
element from a prior art reference negates anticipation. *Atlas Powder Co. v. E.I. du Pont de Nemours & Co.*, 224 USPQ 409 (Fed. Cir. 1984). Therefore, claims 2-6, 10 and 13 are not anticipated by the Smith et al. reference.

Applicants gratefully acknowledge the Examiner's indication of allowable subject matter in claims 7-9, 11-12, 16, and 19-26. However, as the foregoing discussion shows, claims 2-6, 10, and 13 are also allowable over the art of record. It is therefore respectfully requested that the rejection of claims 2-6, 10 and 13 be withdrawn, and all the claims remaining in the application be passed to issue.

CONCLUSION

The present claims are believed to be in condition for allowance, and prompt issuance of a Notice of Allowance is respectfully solicited. The Examiner is encouraged to contact the undersigned by telephone if it is believed that discussion will resolve any outstanding issues.

Respectfully submitted,



Karen A. Lowney, Reg.No. 31,274
Estee Lauder Companies
125 Pinelawn Road
Melville, NY 11747
(631)531-1191